IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of	)	No. 80570-9
	)	
JOHN L. STRAND,	)	En Banc
	)	
Petitioner.	)	
	)	Filed October 8, 2009

OWENS, J. -- At issue in this case is whether the sexually violent predator (SVP) statute, chapter 71.09 RCW, allows the State to perform "[a] current mental health evaluation" of a prisoner prior to the commencement of SVP commitment proceedings. RCW 71.09.025(1)(b)(v). Here, the State authorized the examination of John Strand in advance of his release from prison for purposes of providing "[a] current mental health evaluation" under RCW 71.09.025(1)(b)(v). Relying on documentary and testimonial evidence, as well as its expert's opinion, the State then petitioned to commit Strand pursuant to the SVP statute and was successful in doing so. Strand appealed, contending that the State could not conduct a mental health evaluation prior to the commencement of proceedings, that he had been denied access to counsel, and that it had not proved that his statements were made voluntarily. The

Court of Appeals upheld his commitment. We affirm.

FACTS

In December 1992, Strand was convicted of first degree child molestation and resisting arrest in connection with an incident where he put his hands inside a four-year-old girl's underpants. Strand was given an exceptional sentence of 150 months and an additional 36 months in community placement.

Prior to Strand's scheduled release date of February 9, 2005, the State filed a petition alleging that Strand was an SVP as defined in chapter 71.09 RCW. This petition relied, in part, on a mental health evaluation that had been conducted "pursuant to RCW 71.09" by Dr. Kathleen Longwell on January 5, 2004. Clerk's Papers at 104. Prior to her evaluation of Strand, Dr. Longwell informed him that the interview was not confidential and that the information he volunteered to her could be used against him in an SVP commitment proceeding. Strand agreed to the evaluation and signed a consent form. *Id.*[1] During the evaluation, Dr. Longwell asked Strand about a number of unadjudicated sexual offenses which Strand was alleged to have committed. Strand denied any sexual misconduct, including the unadjudicated offenses and the first degree child molestation of which he was convicted. However, Strand did admit to having contact with the unadjudicated victims at the times and places described.

[1] This form is not included in the record before the court. There was, however, no objection to the reference to it in Dr. Longwell's report.

On May 16, 2005, the trial court found probable cause that Strand was an SVP. Strand did not object to Dr. Longwell's prefiling examination. On November 8, 2005, Dr. Longwell met with Strand with counsel present in accordance with the trial court's order directing an evaluation pursuant to RCW 71.09.040(4). At this time, Strand did not object to Dr. Longwell's pre- or postfiling examination.

Prior to trial, Strand sought to exclude the testimony of the unadjudicated victims, arguing that their testimony was irrelevant and prejudicial. In part based upon Strand's unintentional corroboration of the victims' accounts, the trial court determined that it was more likely than not that all but one of the unadjudicated offenses had taken place. After testimony from the unadjudicated victims and Dr. Longwell, Strand testified and again denied any sexual misconduct, but placed himself in the same location as each of the victims. On February 6, 2006, a jury found that Strand was subject to confinement as an SVP.

Strand appealed his commitment to the Court of Appeals, arguing that the State had no authority to examine him until after the probable cause hearing, that he was denied effective assistance of counsel, that his statements were involuntary and inadmissible, and that the loss of a portion of the verbatim trial transcript required reversal of his commitment. *In re Det. of Strand*, 139 Wn. App. 904, 162 P.3d 1195 (2007). The Court of Appeals affirmed Strand's commitment. *Id*. at 915.

Strand petitioned this court for review. We granted review of two issues: whether a mental examination of Strand as a potential SVP is authorized prior to a judicial finding of probable cause and whether the trial court was required to determine if Strand's statements were voluntary before admitting them in the SVP proceeding. *In re Det. of Strand*, 163 Wn.2d 1022, 185 P.3d 1195 (2008).

STANDARD OF REVIEW

"Statutory construction is a question of law reviewed de novo." *In re Det. of Martin*, 163 Wn.2d 501, 506, 182 P.3d 951 (2008). Questions involving allegations of constitutional violations are also reviewed de novo. *See*, *e.g.*, *State v. Eckblad*, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004).

ANALYSIS

"This court has 'steadfastly adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.'" *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985) (quoting *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)). Strand failed to object to the use of Dr. Longwell's report and failed to assert that his statements were anything but voluntary either during the two years leading up to his trial or during his trial. As such, Strand may claim a new error only if he can show a "manifest error affecting a constitutional right." RAP 2.5(a).[2] Strand alleges three

[2] Errors may also be raised on appeal for the first time if they involve "lack of trial court

manifest constitutional errors: (1) that Dr. Longwell's prefiling evaluation was in violation of the SVP statute and therefore violated his due process rights, (2) that he was not provided with counsel during Dr. Longwell's prefiling evaluation, and (3) that he did not receive a hearing to determine the voluntariness of his prefiling statements.

I. *Dr. Longwell's Examination of Strand Was Conducted within the Statutory Framework of Chapter 71.09 RCW*

"[S]tate statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Vitek v. Jones*, 445 U.S. 480, 488, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). The "process due" to a person subject to an SVP petition is the procedure allocated by "the statute which authorizes civil incarceration." *Martin*, 163 Wn.2d at 511. Strand claims that his due process rights were violated when the State asked Dr. Longwell to examine him prior to the commencement of SVP proceedings, an examination he believes was unauthorized by the SVP statute.

The SVP statute, however, authorizes a prefiling psychological examination. RCW 71.09.025(1)(b) contains the pertinent statutory language: "The agency [with jurisdiction] shall provide the prosecuting agency with all relevant information including but not limited to the following information: . . . (iii) All records relating to the psychological or psychiatric evaluation and/or treatment of the person; . . . (v) A

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jurisdiction" or "failure to establish facts upon which relief can be granted." RAP 2.5(a). Strand makes no such claims here.

current mental health evaluation or mental health records review." RCW 71.09.025(1)(b).

At issue is whether the legislature intended the term "current," in the context of providing "[a] current mental health evaluation or mental health records review," to authorize a new evaluation or merely the forwarding of the last available evaluation. The primary objective of any statutory construction inquiry "is to ascertain and carry out the intent of the Legislature." *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). "Current" has two possibly applicable definitions: "occurring in or belonging to the present time" and "in evidence or in operation at the time actually elapsing." Webster's Third New International Dictionary 557 (2002). Thus, "current" could mean either "occurring in the present time" (a new evaluation) or "in operation at the time actually elapsing" (the last available evaluation). However, a comprehensive reading of chapter 71.09 RCW shows that the plain meaning of "current" must include a new evaluation. "Plain meaning is 'discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 909, 154 P.3d 882 (2007) (quoting *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007)).

Reading "current" in RCW 71.09.025(1)(b)(v) as authorizing the release of only

the last available evaluation does not make sense in the context the word is used. "[A] single word in a statute should not be read in isolation, and . . . 'the meaning of words may be indicated or controlled by those with which they are associated.'" *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (internal quotation marks omitted) (quoting *State v. Jackson*, 137 Wn.2d 712, 729, 976 P.2d 1229 (1999)). In this case, the statute is phrased "provide . . . [a] current" and uses the indefinite article "a" as opposed to a definite article, such as "the." "A" is "used as a function word before most singular nouns other than proper and mass nouns when the individual in question is undetermined, unidentified, or unspecified." Webster's, *supra*, at 1. Therefore, by choosing the use of an indefinite article instead of using a definite article, the legislature intended to provide "a current mental health evaluation" that is undetermined (i.e., yet to be done) rather than "the current mental health evaluation," which has already been determined.

Additionally, interpreting RCW 71.09.025(1)(b)(v) to not authorize the agency to perform a mental health evaluation would render that statutory language superfluous. Under rules of statutory construction "no part of a statute should be deemed inoperative or superfluous unless it is the result of obvious mistake or error." *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 13, 810 P.2d 917, 817 P.2d 1359 (1991). RCW 71.09.025(1)(b)(iii) requires the agency to deliver to the prosecutor "[a]ll

records relating to the psychological or psychiatric evaluation and/or treatment of the person." Because the agency must provide all records under RCW 71.09.025(1)(b)(iii), the language in RCW 71.09.025(1)(b)(v) would be superfluous if it merely specified another existing record that shall be provided. Therefore, RCW 71.09.025(1)(b)(v) must authorize the agency to perform an evaluation.

Strand claims that this cannot be the case because this court has previously stated that "RCW 71.09.040 provides the exclusive means for obtaining mental examinations of civil commitment respondents." *In re Det. of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006) (citing *In re Det. of Williams*, 147 Wn.2d 476, 490-91, 55 P.3d 597 (2002)). Strand, however, misapplies *Audett*. First, the language from *Audett* that Strand cites simply does not apply to him because he was not a *respondent* at the time of Dr. Longwell's first mental health evaluation.[3] Second, a full reading of *Audett* shows that it provides little, if any, support for Strand's position that chapter 71.09 RCW bans prefiling examinations. The issue in *Audett* was whether or not this court's decision in *Williams* was to apply retroactively. *Id.* at 715. *Williams* addressed only whether or not a prosecutor could compel an examination under CR 35 *during* SVP proceedings under chapter 71.09 RCW. *Williams*, 147 Wn.2d at 486. It did not address the use of voluntary examinations that took place prior to the

[3] Given that chapter 71.05 RCW also provides for mental examinations of some civil commitment respondents, it may also be inaccurate to say RCW 71.09.040 is the *exclusive* means to obtain a mental examination.

commencement of SVP proceedings. Indeed, in *Williams* this court was presented with multiple instances of prefiling and pre-probable-cause-hearing mental health examinations and did not find any reason to question their validity. *See id*. at 480-84.

The SVP statute authorizes a current mental health evaluation to be performed and provided to the prosecutor. Consequently, Strand's claim that Dr. Longwell's evaluation was unauthorized by statute and in violation of due process is rejected.

II. *Strand Did Not Have a Right to Counsel at his Prefiling Examination*

Strand argues that he had a statutory right to counsel at Dr. Longwell's prefiling evaluation. The SVP statute specifically provides the right to counsel during key portions of an SVP proceeding: (1) during the probable cause hearing, RCW 71.09.040(3); (2) after the probable cause hearing and through the initial commitment trial, RCW 71.09.050(1); and (3) after the commitment during postcommitment release proceedings, RCW 71.09.090(2)(b). Under the statutory canon expressio unius est exlusio alterius, the express inclusion in a statute of the situations in which it applies implies that other situations are intentionally omitted. *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). The legislature included an express statutory right to counsel during only certain stages of an SVP proceeding. This does not include the investigatory period prior to a probable cause filing.

In the absence of an express right to counsel, Strand attempts to read one into

RCW 71.09.050(1), which provides that SVP respondents "shall be entitled to the assistance of counsel" at "all stages of the proceedings." Strand claims that "all stages of the proceedings" includes a prefiling investigatory mental health examination. Strand's reading, however, runs counter to the language of the statute. "[P]roceeding" is defined as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." Black's Law Dictionary 1324 (9th ed. 2009). Reading the statute in context, the phrase "stages of the proceedings" appears only in the section titled, "Trial–Rights of parties." RCW 71.09.050. We have previously held that this analysis leads to the conclusion that "stages of the proceedings" refers to "*only three specific events* set forth in the chapter that the legislature might have explicitly considered to be 'proceedings'[:] [f]irst, the probable cause hearing[,] RCW 71.09.040(2)[;] [s]econd, the statutorily mandated examination[,] RCW 71.09.040(4)[;] [f]inally, the trial itself[,] RCW 71.09.050." *In re Det. of Kistenmacher*, 163 Wn.2d 166, 171, 178 P.3d 949 (2008) (emphasis added). Indeed, we have previously rejected an overarching right to counsel, stating that "[i]f RCW 71.09.050(1) truly represents the overarching statutory grant of the right to counsel at all stages of all proceedings under the entire chapter, the grant of the right to counsel in [RCW 71.09.090(2)] is surplusage." *In re Det. of Petersen*, 138 Wn.2d 70, 92, 980 P.2d 1204 (1999). Strand urges us to adopt an interpretation of RCW

71.09.050(1) that would do precisely the same thing. We decline to do so.

Strand further argues that he had a constitutional right to counsel during his prefiling evaluation and that that right was violated. Since SVP proceedings are civil and not criminal in nature, the rights afforded under the Fifth and Sixth Amendments do not attach to SVP petitioners. *Id*. at 91 (citing *In re Pers. Restraint of Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993)). As such, Strand must rely solely on the guaranty of "fundamental fairness" provided by the due process clause. *Id*. "[I]t is possible to postulate that a biased or negligent psychologist in the employ of the State may conduct a tendentious or careless examination and reach an unsupportable or incorrect conclusion." *Id*. at 91-92. However, as in *Petersen*, any concerns that Dr. Longwell's examination rose to such an egregious level are "wholly cured by [the defendant's] statutory right[s]." *Id*. at 92. Strand had the right to court-appointed counsel at "all stages of the proceedings" and the right to an expert of his choosing at public expense. RCW 71.09.050(1), (2). Strand also had the right, through counsel, to present evidence and question witnesses, including Dr. Longwell, at his probable cause hearing. RCW 71.09.040(2), (3). These rights are enough to ensure the "fundamental fairness" of the due process clause. As such, there is no constitutional or statutory mandate that requires the presence of counsel during a prefiling examination.

III. *Strand Is Not Entitled to a Voluntariness Hearing*

Finally, Strand contends that the trial court did not hold a voluntariness hearing to determine if the statements that he gave prior to and during the SVP proceeding were admissible. Strand claims that this violated his due process rights. Strand, however, cites no authority granting the right to a voluntariness hearing in the context of a voluntary prefiling psychological interview. Instead, Strand attempts to use federal immigration and criminal law to imply such a right. First, as stated above, SVP proceedings are civil and not criminal in nature. *Young*, 122 Wn.2d at 23. If Strand's statements are indeed a confession, and are later used to prosecute Strand, he is constitutionally entitled to a voluntariness hearing in that criminal proceeding. *Jackson v. Denno*, 378 U.S. 368, 391, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). This entitlement, however, does not extend to civil proceedings.

Second, Strand's analogy to immigration cases serves to undermine his argument that his due process rights were violated. Immigration hearings, like SVP proceedings, must comply with the due process guaranty of fundamental fairness. *See*, *e.g.*, *Cuevas-Ortega v. Immigration & Naturalization Serv.*, 588 F.2d 1274, 1277 (9th Cir. 1979); *supra* p.11. However, the civil nature of such hearings renders the voluntariness inquiry "markedly different from that in the criminal context." *Cuevas-Ortega*, 588 F.2d at 1277. In particular, the burden is on the respondent to the proceedings, not the State, to demonstrate a lack of voluntariness. *See United States v.*

Alderete-Deras, 743 F.2d 645, 648 (9th Cir. 1984) (holding that exclusion requires a showing of coercion or improper behavior); *Cuevas-Ortega*, 588 F.2d at 1278 (holding that involuntariness requires a showing of "coercion, duress, or improper action"); *cf*. *Bong Youn Choy v. Barber*, 279 F.2d 642, 647 (9th Cir. 1960) ("the record *leaves no room for doubt* that the improper conduct of the Immigration agents induced the admissions" (emphasis added)). In *Bong Youn Choy*, the respondent to the deportation proceeding offered unchallenged testimony that the authorities made threats of criminal prosecution and deportation over a period of seven hours which stretched into the early morning to coerce a confession. 279 F.2d at 644-47. Choy was subjected to threats that "induc[ed] fear" and caused "mental terror" to the point that he felt compelled to give a confession after hours of repeated denials of any criminal conduct. *Id*. at 647. No such violation is alleged here. Strand produces little beyond his self-serving assertion that he made his repeated and consistent statements involuntarily.

The due process standard for inadmissible involuntary statements in civil cases requires that the "statement was induced by coercion, duress, or improper action on the part of the . . . officer, and where the petitioner introduces no such evidence, the bare assertion that a statement is involuntary is insufficient." *Cuevas-Ortega*, 588 F.2d at 1278 (citing *Ben Huie v. Immigration & Naturalization Serv.*, 349 F.2d 1014, 1017 (9th Cir. 1965)). Strand has provided nothing more than a bare assertion of

involuntariness. Due to Strand's failure to make the threshold showing that his statement was inadmissible, he was not entitled to a voluntariness hearing.

CONCLUSION

The SVP statute authorizes a current mental health examination be provided to the prosecutor at which the SVP petitioner has no statutory or constitutional right to counsel. Additionally, there is no voluntariness hearing provided for in the civil SVP statute and no constitutional requirement to create one. For these reasons, we affirm the decision of the Court of Appeals.

AUTHOR:

Justice Susan Owens

WE CONCUR:

Justice Charles W. Johnson	Justice Mary E. Fairhurst
Justice Barbara A. Madsen	Justice James M. Johnson